U.S. Department of Labor

Office of Administrative Law Judges
Heritage Plaza Bldg. - Suite 530
111 Veterans Memorial Blvd
Metairie, LA 70005

(504) 589-6201
(504) 589-6268 (FAX)

Issue Date: 17 June 2005

CASE NO.: 2004-LHC-1793

OWCP NO.: 07-140228

IN THE MATTER OF

JAMES G. WILKINSON
Claimant

v.

BATON ROUGE MARINE CONTRACTORS,
Employer

LOUISIANA STEVEDORES,
Employer

and

EMPLOYERS NATIONAL INS. CORP.,
c/o LIGA,
Carrier

LOUISIANA STEVEDORES,
c/o ENIC
c/o LIGA
Carrier

NATIONAL BEN FRANKLIN INS. CO. OF PITTS, PA,
FIDELITY AND CASUALTY OF N.Y., c/o MOAC,
Carrier

SIGNAL MUTUAL,
c/o LAMORTE BURNS AND CO.,
Carrier

APPEARANCES:

John F. Dillon, Esq.
On behalf of Claimant

V. William Farrington, Esq.
On behalf of Baton Rouge Marine Contractors, Fidelity and Casualty Co. of N.Y. and National Ben Franklin Ins. Co. of Pitts., PA

Henry G. Terhoeve, Esq.
On behalf of Louisiana Insurance Guarantee Association (LIGA)

Traci Castille, Esq.
On behalf of Signal Mutual Indemnity Association, Ltd.

Amy Sanders, Esq.
Office of the Solicitor

Before: CLEMENT J. KENNINGTON
Administrative Law Judge

DECISION AND ORDER AWARDING BENEFITS

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act (the Act), 33 U.S.C. § 901, *et seq*., (2000) brought by James G. Wilkinson (Claimant) against Baton Rouge Marine Contractors and Louisiana Stevedores (Employers) and Employers National Ins. Corp. c/o LIGA, National Ben Franklin Ins. Co. of Pitts. PA Fidelity and Causalty of N.Y., c/o MOAC, and Signal Mutual c/o Lamorte Burns and Co. (Carriers). The issues raised by the parties could not be resolved administratively and the matter was referred to the Office of Administrative Law Judges for a formal hearing. The hearing was held on January 24, 2005, in Metairie, Louisiana.

At the hearing all parties were afforded the opportunity to adduce testimony, offer documentary evidence, and submit post-hearing briefs in support of their positions. Claimant testified and introduced nineteen (19) exhibits which were admitted, including: Claimant's medical reports and initial asbestos screening; Claimant's Social Security records; Claimant's timesheets; and depositions of Claimant, Louis Genusa, Curles McGee, John Badeaux, William Parker, Charley Young, Baton Rouge Marine Contractors, Emma LeFebrvre, Elbert Forest, Dr. Gerald Liuzza, Dr. Gomes, Frank Parker and Anthony Leon Walker.[1] Employers called Emma LeFebvre and Violet Edwards-Hurst to testify. Baton Rouge Marine Contractors (BRM) and Fidelity and Casualty Company of New York, National Ben Franklin Insurance Company introduced six (6) exhibits, which were admitted, including: the Notice of Controversion; Claimant's Social Security statement; Baton Rouge Steamship Association's Longshoremen Work Report for July 28, 1974; Claimant's separation notice; and history of BRM's insurance coverage from 1958-2000. BRM and Signal Mutual introduced twenty-four (24) exhibits, which were admitted, including: various Department of Labor filings; affidavits of Jay Hardman, Michael J. Horray, Emma Lee LeFebvre; Comparative Loading Statements from the Port of Baton Rouge; insurance policies of BRM; Claimant's medical records; report of Robert Jones; Claimant's earnings; and depositions of Emma Lee LeFebvre and Claimant. LIGA introduced nineteen exhibits, which were admitted, including: reports and records of Dr. Jones and Dr. Smith; insurance policies through Fidelity and Casualty Co. of New York, Signal Mutual, Gray Insurance, Hartford, and National Union Fire; July 1974 job tickets and cargo records; records from Baton Rouge Steamship Association; list of asbestos ships; Port of Baton Rouge Records; discovery responses and stipulations.

Post-hearing briefs were filed by the parties. Based upon the stipulations of the parties, the evidence introduced, my observation of the witness demeanor, and the arguments presented, I make the following Findings of Fact, Conclusions of Law, and Order.

I. STIPULATIONS

At the commencement of the hearing the parties stipulated and I find:

[1] References to the transcript and exhibits are as follows: trial transcript- Tr.__; Claimant's exhibits- CX-, p.__; Employer exhibits- EX-__, p.__; Administrative Law Judge exhibits- ALJX-__; p.___.

1. Employer BRM was advised of the injury on July 12, 1996, and Employer Louisiana Stevedores was advised of the injury on May 22, 2004;

2. BRM and Signal filed a Notice of Controversion on August 16, 1996;

3. An informal conference was held on May 15, 2003;

4. Claimant's average weekly wage shall be the National Average Weekly Wage;

5. No benefits have been paid.

II. ISSUES

The following unresolved issues were presented by the parties:

1. Claimant's entitlement to benefits, if any;

2. Responsible employer/subsequent maritime employment;

3. Responsible carrier;

4. Alternate claim for Section 8(f) relief.

III. STATEMENT OF THE CASE

A. Chronology:

This is a case to determine liability of the employers and carriers involved, and to set up medical monitoring for Claimant. Claimant worked on the docks at the Port of Baton Rouge during the 1960s and 1970s when asbestos cargo was shipped through the port. In 1994, Claimant was diagnosed with asbestos on both sides of his lungs, although he has yet to develop disabling asbestosis.

B. Claimant's Testimony

Claimant is a 71-year old resident of Liberty, Mississippi, who worked at the Port of Baton Rouge from 1960 until his retirement around 1991. He was a longshoreman for BRM, Louisiana Stevedores and Ryan-Walsh Stevedores as well as Capitol City Stevedores, Ceres Gulf and Cargill. Claimant testified at the hearing he retired in July, 1990, and has since received monthly payments from his ILA pension and Social Security retirement, in the amounts of $1,155.00 and $1,270 respectively. Claimant testified he was working for BRM at the time of his retirement.[2] (CX-9, pp. 12-13, 26; Tr. 37-41).

Claimant testified he handled asbestos while working for BRM, unloading it from ships and loading it onto trucks; it was not a regular cargo but only came through the port every one to three months. Claimant explained the sacks of asbestos were loose in the hold of the ship and they would load them into a cargo net to be lifted onto the docks; from there the sacks were moved into the warehouse. He recalled having to empty sacks of asbestos on the warehouse floor for testing purposes. Afterwards, Claimant shoveled the asbestos back into the sacks, tied them up and placed them on the cargo pallets. He clarified the testing was performed after the sacks were unloaded into the warehouse. (CX-9, pp. 29, 42-44, 54-55, 58-60, 63). Claimant further testified the stevedoring company that unloaded the ship was generally responsible for sampling the cargo. He explained five sacks from each pallet would be subject to a sniff test whereby the bag was opened and a handful of asbestos removed so it could be sniffed to see if it was sour. Claimant testified the asbestos fibers were mostly bluish-gray. (CX-9, pp. 50-52).

Claimant testified handling asbestos gave off a lot of dust, particularly when the burlap sacks were torn. He explained the sacks did not have any warnings on them, and the longshoremen were not given safety instructions or special equipment for handling asbestos in the 1960s. In the 1970s, they were provided paper masks, although they were difficult to breathe through, particularly while stacking sacks of asbestos in the trucks. Claimant testified the masks were

[2] Although Claimant was initially confused at the hearing as to which stevedore company he last worked for at the Port of Baton Rouge, I find his Social Security Records support his testimony that BRM was the last company he worked for prior to his retirement. (*See* Tr. 40-42; CX-11).

normally clogged with dust and sweat. (CX-9, pp. 46-47, 57, 71). He further testified the Port Commission occasionally washed the warehouse out; he did not know of any special cleaning procedures but only that the area was hosed down. (CX-9, pp. 65-66). Claimant testified he did not recall asbestos being exported from the port in the 1970s, nor did he remember loading any asbestos onto the ships. Additionally, a second warehouse was built in the 1980s, long after asbestos stopped being shipped to or from the port. (CX-9, pp. 64-65; Tr. 38-39).

C. Testimony of Emma LeFebvre

Ms. LeFebrve worked for BRM from October 1970 through December 31, 1995, after which she continued to work part time. She started in the accounting department, but after two years she was promoted to executive secretary for the president and vice president, and in 1987 she became administrative assistant to the president of the company. (Tr. 44-45). Ms. LeFebvre was responsible for handling the company's human resources department including the workers' compensation claims; she worked with both the injured longshoremen and insurance adjusters in both state and federal claims. Ms. LeFebvre testified this job familiarized her with BRM's insurance policies, and she compiled all the policies for purposes of this hearing. She testified the policies submitted into evidence as BRM EX-11 is consistent with the list she provided in her affidavit and includes both Longshore and other policies; she testified she is not aware of any other policy held by BRM aside from what is listed. Ms. LeFebvre indicated BRM began carrying comprehensive general liability coverage in 1982. (Tr. 45-48, 64-65).

Ms. LeFebvre testified BRM handled asbestos cargo; specifically, LIGA's exhibit 11 is a list of the ships which unloaded asbestos in the Port of Baton Rouge.[3] The list was compiled by the Greater Baton Rouge Port Commission in 1987, and was provided to BRM at that time. It lists the agents that handled the various ships between December 1961 and 1966; the last ship unloaded asbestos on November 11, 1966. She explained that asbestos was unloaded and delivered to Sharp Station. (Tr. 49, 55). Then, in 1971, BRM started receiving asbestos shipments from Sharp Station to be loaded for export out of the port; this occurred

[3] Ms. LeFebvre testified she became familiar with BRM's handling of asbestos in the 1960s through her detailed research in connection with various workers' compensation claims. She emphasized she was only familiar with asbestos as a separate commodity, as indicated on the comparative loading statements, and did not know if other goods contained asbestos. (Tr. 64-65, 67).

on no more than on ten different occasions. Ms. LeFebvre testified the Comparative Loading Statements (CLS) list the ships which were loaded at the port. Specifically, the lists showed the day the ship came in, the day it sailed, the ship's agent, amount of tonnage and commodity loaded or unloaded. The CLS listed tonnage handled by both BRM and its competitors at the port. It was not compiled by Ms. LeFebvre, but she typed them up and kept them in BRM's records.[4] She explained, however, that a "D" on the list indicated cargo was discharged or unloaded from the ship; if there was an L or no letter, cargo was loaded onto the ship. (Tr. 49-50, 56, 67-69).

Ms. LeFebvre also testified the warehouse was owned by the port and used by all the stevedoring companies, including BRM. She added that although her office was not in the warehouse, and though she did not witness asbestos operations, she did visit the warehouse often. (Tr. 59-60, 64). She did not work for BRM in the 1960s when sacks of asbestos were unloaded in the port and sampled in the warehouse and she did not witness the loading of asbestos sacks in the 1970s. Specifically, Ms. LeFebvre testified she had no knowledge of the inspection process, the condition of the sacks of asbestos or the engineering controls for the warehouse. (Tr. 76-77).

Ms. LeFebvre testified the longshoremen working for BRM did not receive specialized training about asbestos as a hazard, because the dangers were not known at the time she was hired. Asbestos was not considered hazardous cargo, and there was no attention paid to special protection or remedial measures. Specifically, Ms. LeFebvre testified BRM, the Steamship Association and the Union all were unaware of the hazards of asbestos otherwise it would have been listed as a hazardous material in their contracts with one another. (Tr. 65-66). However, she also testified the workers were provided 3M dust masks upon request; these were similar to the masks provided to the grain handlers. (Tr. 77).

Ms. LeFebvre testified BRM last handled asbestos in June 1973, as reflected in the CLS. Employer's Casualty Co. provided BRM's Longshore insurance coverage in 1973. Ms. LeFebvre further stated that during this time period, BRM did not carry excess insurance coverage. (Tr. 51-53, 54). She testified she was unaware of any letter from National Ben Franklin, Fidelity and Casualty, Continental or Signal Mutual denying coverage for Claimant's claims. (Tr. 60).

[4] The CLS for the periods between January 1964 to December 1966 and February 1971 and December 1974 are submitted as Signal EX-9. Ms. LeFebvre testified she has more complete CLS records, but these were the only time periods when asbestos was handled in the port. (Tr. 55).

However, she explained the CLS indicated asbestos was last handled in the port on July 28, 1974, by Louisiana Stevedores; following this shipment there was no asbestos left in the warehouse. Ms. LeFebvre explained July 28, 1974 was a Sunday and BRM did not have a ship sailing that day, so it would not have worked at all. According to the CLS, BRM's ship left July 26, and they did not have a ship in port over the weekend. She further testified BRM had a truck-loading contract with the State of Louisiana Port Commission whereby BRM loaded and unloaded all of the trucks leaving the port. Although the last shipment of asbestos was handled by Louisiana Stevedores on a Sunday which BRM did not work, Ms. LeFebvre testified BRM would have unloaded the asbestos from the trucks entering the port the day before, and placed the asbestos in the warehouse for Louisiana Stevedores to then transport dockside. (Tr. 70-71, 74-76).

Ms. LeFebvre also stated the Daily Longshore Work Report was prepared by the Baton Rouge Steamship Association and documented when longshoremen were hired. An "x" means the person was absent, a "w" indicates he was hired that day, an "av" indicates the longshoreman was available, but not hired. Ms. LeFebvre testified the Report shows Claimant worked on July 27 and 28, 1974. However, she added that the Daily Work Report does not indicate which company he worked for, unless there was only one company working that day. Ms. LeFebvre clarified she was certain that Louisiana Stevedores was the only company working on July 28, 1974, pursuant to the comparative loading statement for that day. (Tr. 53-54, 70, 72-73).

Ms. LeFebvre explained that claimant was not a direct employee of BRM, nor did they work exclusively for BRM; as members of the International Longshoremen's Association, they were hired at a daily shape-up where various stevedoring companies would hire the workers they needed for that day. Ms. LeFebvre testified the Baton Rouge Steamship Association, comprised of all the stevedoring companies working out of the port, documented all the work records at the daily shape-ups and negotiated contracts with the stevedoring companies. BRM hired workers at the shape-up and paid them, but did not have anything to do with the Steamship Association. Ms. LeFebvre testified BRM kept time sheets indicating when longshoremen worked. She further testified BRM did not own the ships carrying the asbestos, the cargo, nor did BRM pay for transporting the goods. BRM similarly did not own, operate or work at Sharp Station. Rather, the agents in New Orleans that BRM worked for would simply notify them of ships en route to the Port of Baton Rouge, and ask BRM to handle the ships in Baton Rouge. (Tr. 56-59, 69).

D. Testimony of Violet Edwards-Hurst

Ms. Edwards-Hurst is an employee for the Louisiana Insurance Guarantee Association (LIGA). She testified that she reviewed the files for Claimant, Mr. Wilkinson and Mr. McGee. She stated LIGA was first put on notice of Claimant's claim against Louisiana Stevedores on May 22, 2002. However, she also testified LIGA had earlier notice of the various claims against BRM, although she did not have specific dates. With respect to the BRM claims, Ms. Edwards-Hurst testified LIGA's position was that there was other coverage sufficient to cover the claims. She explained that Louisiana state law would require the claimant to exhaust all other insurance policies held by the employer before LIGA could be found liable. (Tr. 85-89).

E. Exhibits

1) Deposition of John Badeaux, Jr.[5]

Mr. Badeaux worked at the Port of Baton Rouge for 31 years, from 1961 until his retirement in 1992 (CX-10, p. 6). Mr. Badeaux testified he worked as a regular longshoreman primarily for BRM, which was the biggest company at the port. He also worked for Cooper/T. Smith, Ryan and Louisiana Stevedores. At BRM Mr. Badeaux was in the hold unloading ships; later he was assigned to driving forklift between the ships and the warehouse. Mr. Badeaux testified he was never involved with loading or unloading the trucks. (CX-10, pp. 6-7, 9, 14-15).

Mr. Badeaux testified asbestos was shipped into the port in the 1960s, 1970s and possibly into the early 1980s; he stated it was always shipped in and then sent out on trucks, but was never exported from the port. (CX-10, p. 8). The foreman advised the workers when there was an asbestos ship coming into the port; he recalled the asbestos was packaged in sacks which did not have any warning or cautionary signs on them. Mr. Badeaux stated the foremen would provide paper masks to workers upon request while they handled asbestos; however, no one explained to the longshoremen why a mask was necessary. Mr. Badeaux further

[5] Mr. Badeaux's deposition was taken on July 28, 2004, in connection with the case John Badeaux v. Baton Rouge Marine Contractors, Inc. The deposition was attended by representatives of Mr. Genusa, BRM, Signal and National Ben Franklin Insurance Company.

explained the sacks of asbestos were loose in the hold of the ship and they would load them into a cargo net to be lifted onto the docks; from there the sacks were moved into the warehouse. He was a hold man in the ship most of the time and did not remember transporting sacks of asbestos on his forklift. However, he recalled having to empty sacks of asbestos in the warehouse for testing purposes. Afterwards, he shoveled the asbestos back into the sacks, tied them up and placed them on the cargo pallets. Mr. Badeaux explained the testing was performed after the sacks were unloaded into the warehouse. (CX-10, pp. 7-9, 11, 16-18).

Mr. Badeaux recalled working with asbestos for about seven years in the 1960s and 1970s, although he did not know the precise years or when he last handled asbestos. (CX-10, p. 13). However, Mr. Badeaux testified he was exposed to asbestos up until his retirement, as the warehouse had asbestos shingles which occasionally fell onto the floor. He knew the shingles were filled with asbestos because he could see the fibers. When the shingles fell, they would create dust in the cargo area; Mr. Badeaux could not recall the last time this happened. (CX-10, pp. 9, 17).

Mr. Badeaux described the warehouse as being approximately as large as three football fields, and was completely open. It was run exclusively by BRM. (CX-10, p. 10, 16). Mr. Badeaux also worked with rubber at the port, which produced a white powder when handled. Other cargo which he handled in the port included polyethylene, plywood, fertilizer and coffee. (CX-10, pp. 18-19).

2) Depositions of William Parker[6], Charley Young[7], Elbert Earl Forest, Louis Genusa, Curles McGee, and Anthony Leon Walker

Mr. Parker worked as a Longshoreman at the port of Baton Rouge for 22 years. He worked for BRM, Rogers, Southeastern and Ramsay Scarlett. During his work at the port he was exposed to asbestos. Mr. Parker testified BRM was the last employer he worked with, but he did not recall which employer last exposed him to asbestos. (CX-11).

[6] Mr. Parker's deposition was taken on August 21, 1997, in connection with his personal claim against BRM. With respect to the current case, counsel for Claimant and BRM were present at this deposition. (CX-11).

[7] Mr. Young's deposition was taken on June 28, 1999, in connection with his personal claim against BRM. (CX-12).

Mr. Young worked at the Port of Baton Rouge for approximately twenty-two years, until his retirement in 1977. He testified he worked asbestos for BRM during that time. He also worked for Ryan Stevedores, Capitol City Stevedores. Mr. Young testified he worked around asbestos for a long time, about twenty years. He testified his job on the docks was loading and unloading the ships; when he worked for Ryan or Capitol City the ships had asbestos insulation, although he only handled asbestos cargo for BRM. (CX-12, pp. 8-9, 18-19). Mr. Parker was diagnosed with asbestos in his lungs in 1983. (CX-12, p. 37).

Mr. Forest worked as a longshoreman at the Port of Baton Rouge from 1966 until 1979 or 1980. He testified asbestos cargo came into the port every three to four months, and largely corroborated Claimant's testimony regarding the procedures used to unload the asbestos off of the ships. Mr. Forest also corroborated previous testimony about the government inspection process of the asbestos. He testified unloading asbestos was a dusty procedure, and the paper masks provided were difficult to breathe through. He added that BRM handled most of the asbestos cargo. The Port also handled a lot of grain, which was also a dusty product. (CX-15).

Mr. McGee was a general longshoreman at the Port of Baton Rouge from 1964 to 1976. During this time he handled asbestos cargo for BRM and Ryan Walsh. Mr. McGee testified the main cargos shipped through the Port of Baton Rouge were asbestos and motorcycles. The last time asbestos was shipped into the port was in 1966; however, he testified a few shipments of asbestos were exported in the 1970s. Mr. McGee testified the dangers of asbestos were not known at this time. (CX-7, pp. 6-10). Mr. McGee returned to the port in 1990 and worked for BRM until 1998. He did not handle asbestos in the 1990s. Mr. McGee testified BRM handled all the cargo at the port after the ships were unloaded. (CX-7, pp. 13-20).

Mr. Walker was a general longshoreman at the Port of Baton Rouge for 36 years, beginning in 1963. He loaded and unloaded ships and also did warehouse work; he worked for BRM, Ryan-Walsh, Ramsey-Scarlett, Louisiana Stevedores and Capitol City Stevedores. He testified the majority of his work was for BRM, whom he worked for exclusively between 1985 and 1994. (CX-18, pp. 7-8, 14-16, 26). Mr. Walker testified he handled asbestos for both Ryan-Walsh and BRM. He explained BRM had a contract to load all the trucks at the Port of Baton Rouge. (CX-18, pp. 22-23, 37). Mr. Walker testified he saw sacks of asbestos opened up and dumped out in the warehouse for the purposes of government inspection; the Longshoremen were responsible for shoveling the asbestos back into the burlap

sacks and sewing them up. (CX-18, p. 40). He also testified handling asbestos was very dusty; the dust was mostly blue or whitish-silver. Mr. Walker did not recall receiving face masks or safety instructions regarding the handling of asbestos. He similarly did not recall receiving hazard pay when he worked with asbestos, as asbestos was not designated a hazardous cargo at the time. Mr. Walker testified he last worked with asbestos in the 1960s. (CX-18, pp. 40, 43-44, 69).

3) Deposition of Baton Rouge Marine Contractors – Ralph Hill, Joseph Doiron and Emma Lee LeFebvre

The deposition of BRM, attended by Mr. Hill, Mr. Doiron and Ms. LeFebvre, was taken on April 20, 1998, in connection with Parker v. Baton Rouge Marine Contractors.[8] (CX-13, pp. 11-21). BRM testified informal safety meetings were held as far back as 1975, although minutes of said meetings were not kept until 1987. BRM testified asbestos was imported into the Port from South Africa; it arrived loosely packed in burlap bags which emitted a grayish dust. Mike Quaid was BRM's first safety manager, but there was no written safety program or formal training regarding asbestos handling in the 1960s or 1970s. The longshoremen were provided with 3M paper masks, upon request, but they were not required. BRM testified it was not aware asbestos was a hazard until the lawsuits started in the 1980s. Specifically, the deponents testified the employer had an obligation to pay hazard pay to the longshoremen under contract with the union, but asbestos was never listed as a hazardous material. (CX-13, pp. 31-35, 56-60, 67-68, 70).

BRM testified the longshoremen who worked with asbestos would know more about it, including Claimant, Curles McGee, Anthony Leon and Paul Gentile. The deponents largely corroborated Claimant's testimony regarding the process for unloading asbestos, although they testified the bags were never opened for inspection purposes. BRM clarified the government only inspected the asbestos bags to make sure they were dry, but the inspectors did not open the bags. (CX-13, pp. 48-51).

BRM further testified it did not vacuum or use any suction device to eradicate the asbestos from the warehouse, and the quality of air was not monitored for asbestos particles. Indeed, no safety survey was conducted to determine the level of asbestos contamination, as it was not an issue in the 1960s and 1970s.

[8] Mr. Doiron was a ship clerk, then foremen and then promoted to general superintendent at BRM; Mr. Hill started in the agency department before his promotion to assistant to the general manager and was appointed general manager of BRM in 1986. (CX-13, pp. 33-36).

BRM could not recall any OSHA rules pertaining to the handling of asbestos. Although OSHA periodically checked the facilities, the deponents could not recall when this began, or when asbestos rules were first implemented. BRM was also not aware of any air monitoring performed by OSHA. (CX-13, pp. 63-65, 69-70, 84-86).

BRM testified all the facilities at the port, including the warehouse, were owned by the Port of Baton Rouge, which was a subdivision of the State of Louisiana. BRM had a contract with the Port to unload the rail cars and trucks which came into the port. Although the port owned the warehouse, all the companies used it. (CX-13, pp. 78-84).

4) Deposition of Dr. Gerald Liuzza

Dr. Liuzza is board certified in anatomic pathology, clinical pathology and forensic pathology. He previously testified in asbestos-related disease cases. (CX-17, pp. 2-3). He testified the three types of asbestos, white, blue and brown, all result in the same health problems, although white asbestos may require a higher exposure to have the same negative effect. Dr. Liuzza testified asbestos fibers are persistent and the related diseases are progressive in nature and risk thereof continues over time. (CX-17, pp. 3-6). He further testified with respect to Claimant's situation, that occupational exposure to asbestos occurred each time sacks of asbestos were brought into the port. Once the site was contaminated with asbestos, exposure would continue after the loading and unloading process was over, if there was no clean-up to eradicate the asbestos. (CX-17, pp. 8-9).

Dr. Liuzza testified if Claimant's reports were assumed to be accurate, he suffered significant exposure to asbestos. Dr. Liuzza recommended medical monitoring to screen for cancer. (CX-17, pp. 13-14).

5) Deposition of Frank Parker, III

Dr. Parker has been a board certified industrial hygienist since 1973. He received his certification as an environmental engineer in 1988 and is licensed in Texas as an asbestos consultant. He was accepted as an expert witness in the fields of industrial hygiene, environmental engineering and asbestos exposures. His deposition testimony is based on a review of the record, but not a personal inspection of Claimant's work site. (CX-12, pp. 1-6).

Dr. Parker testified asbestos is difficult to destroy and contamination of a site will lead to continual exposure absent their eradication. Specifically, the fibers act like a gas and remain throughout the air long after the sacks of asbestos were removed. (CX-12, pp. 7, 16). Dr. Parker explained the procedure to de-contaminate an asbestos-infested site would be to isolate the facility and vacuum everything, including walls and ceilings, with a heap-vac and special filter. Then everything would be wet-wiped. This process would need to be repeated three to four times, and if the contamination was severe the building would need to be repainted to trap the fibers into the walls, and tiles would need to be replaced. In addition to contamination of the warehouse and port facilities, Dr. Parker testified asbestos was a common component of the ships that carried the cargo into the port. (CX-12, pp. 18-19).

Dr. Parker testified asbestos exposure may result in either pneumoconiosis/asbestosis or lung cancer. He explained that asbestosis is a progressive disease which has a latency period of 8 years up to 50 years. He testified all asbestosis fibers, both commercial and non-commercial, are connected with cancer and asbestosis. (CX-12, pp. 8, 13). Dr. Parker testified the paper masks provided longshoremen are notoriously inefficient at preventing exposure to asbestos. (CX-12, p. 19).

Dr. Parker further testified the handling of asbestos sacks in 1974 was probably not the last injurious exposure Claimant had to asbestos; rather, he would have suffered continued episodic exposure from residue on his clothes or in the warehouse where he worked. Given the amount of asbestos moved through the port in the 1960s and 1970s, the residue could be substantial. As such, Dr. Parker opined the last injurious exposure to asbestos occurred on the last day Claimant worked in the port facilities. However, he stated the last significant exposure would have been when Claimant last handled asbestos in 1974. (CX-12, pp. 21-22, 27). On cross-examination, Dr. Parker testified he never visited the Port of Baton Rouge nor monitored the dust levels in the air at the port. (CX-12, p. 25).

6) Claimant's medical records

On November 14, 1989, an x-ray of Claimant's chest revealed mild diffuse pulmonary scarring in his lungs and a thickening of the pleura bilaterally. This was attributed to an old inflammatory disease. (CX-4, p. 40). X-rays taken of Claimant's chest on February 19, 1993, showed pleural scarring and thickening.

This impression was unchanged in a report dated August 24, 1993. (CX-4, pp. 38-39). On January 18, 1994, Claimant treated with Dr. Hodges upon referral for evaluation for a possible asbestos-induced lung disease. Upon examination, pulmonary function studies and chest x-rays, Dr. Hodges noted Claimant had evidence of asbestos pleural thickening, which was asymptomatic. Claimant's lung capacity was normal and there was no evidence of asbestosis.

Claimant had his initial asbestos screening, sponsored by the union, on August 31, 1994. Pursuant to x-rays taken on this date, Dr. Edwin Holstein diagnosed Claimant with asbestos-related scarring of the lungs and pleura, the lining around the lungs. (CX-1, p. 2).

On May 14, 1997, Dr. Holmes at the Ochsner Clinic of Baton Rouge, ordered chest x-rays of Claimant, which revealed multiple focal pleural plaques bilaterally with no definite adenopathy, pulmonary infiltrate or effusion. These findings were consistent with asbestos exposure. (CX-4, p. 39). X-rays taken September 3, 1999, revealed bilateral pleural plaques with no evidence of pulmonary infiltrate or pleural effusion. These findings supported presence of asbestos exposure, though no definite pathology was evident. (CX-4, p. 38). X-rays ordered October 6, 2000, revealed bilateral chronic pulmonary parenchymal pleural changes consistent with a history of asbestos exposure. (CX-4, p. 37).

Employer/Carriers arranged for Dr. Jones, a professor of pulmonary medicine at Tulane University, to review Claimant's medical records, charts and test results. Dr. Jones reported that Claimant had asbestos-related pleural plaques which confirm a history of asbestos exposure, but do not significantly affect lung function, produce any symptoms or lead to cancer. Dr. Jones indicated Claimant did not suffer from asbestosis and had normal lung function. (LIGA EXH-30; Signal EXH-19, 20).

7) Deposition and Records of Glen Gomes, M.D.

Dr. Gomes testified by deposition on February 18, 2005. He has been at Ochsner in Baton Rouge for the past ten or eleven years, and is board-certified in internal medicine, pulmonary diseases and critical care. He is also a certified B-reader and has worked with asbestos-related diseases for the past fifteen years. He was accepted as an expert witness. (CX-17A, pp. 2-3).

Dr. Gomes evaluated Claimant on November 24, 2003, at which time Claimant complained of shortness of breath and dyspnea which worsened with

strenuous activity. Dr. Gomes took an occupational history, performed a physical examination, chest x-rays and pulmonary function studies. (CX-17A, pp. 3-4). The pulmonary evaluation was an independent medical evaluation for occupational lung disease and revealed a forced vital capacity reduced at 79% of predicted.[9] Claimant's FEV1 was 82%, slow vital capacity at 81% and total lung capacity at 82%. Dr. Gomes testified these results were in the low/normal range and demonstrated mild impairment of lung function. Chest x-rays taken November 22, 2002, revealed bilateral pleural plaque formation, interstitial fibrosis, localized pleural thickening and calcifications in both lungs. Dr. Gomes diagnosed Claimant with pulmonary asbestosis, manifested by the radiographic evidence, rales on physical examination and the impairment of his lung function. (CX-3, pp. 1-2; CX-17A, p. 4). In a report dated January 12, 2005, Dr. Gomes clarified Claimant had a mild impairment of his lung function based on the American Medical Association criteria for disability and impairment. Specifically, he testified Claimant has a class 2 impairment of 10-25% pursuant to the AMA Guidelines, resulting in a mild whole-person impairment. Dr. Gomes explained the impairment rating of 10-25% was based on forced vital capacity between 60 and 79 percent. (CX-3, p. 7; CX-17A, p. 4).

Dr. Gomes testified Claimant had pneumonia as a child, which can also cause pleural scarring. However, he stated the rales associated with pneumonia generally resolve with the illness. Also, scarring which results from serious pneumonia generally only shows up on one side of the lungs. Dr. Gomes noted Claimant's participation in heavy duty manual labor jobs would have been unlikely if he had had breathing problems since childhood. He added that abnormal pulmonary function studies could be the result of cancer that metastasized from an unknown primary area. (CX-17A, pp. 12-13).

Nonetheless, Dr. Gomes testified Claimant has a pretty clear case of asbestosis, a carcinogen, as a result of his exposure to asbestos. He noted Claimant was at an increased risk for developing lung cancer, mesothelioma, cancer of the oropharyngeal tract, vocal chord and esophagus as well as some gastrointestinal malignancies. As such, Dr. Gomes recommended medical monitoring consisting of annual pulmonary function studies, chest x-rays and flu/pneumonia vaccinations. He testified this treatment should continue for the remainder of Claimant's life. (CX-3, p. 2; CX-17A, pp. 4, 8-9).

[9] Dr. Gomes testified the "predicted value" is what a normal person with no lung disease would register in a pulmonary function study. The results of such studies generally range between 80% and 120% of predicted value. (CX-17A, p. 11).

Dr. Gomes stated the occupational history he takes of his patients is more detailed than a general medical history and focuses on initial exposure to dusts vis-à-vis other causes of lung damage such as lung disease, emphysema or asthma. Dr. Gomes specifically looks for exposure to fibrogenic dusts including silica and sand. He further testified all exposures of asbestos are important because the fibers stay in the lungs for a long time; as such, it is difficult for him to apportion percentages of causation across multiple exposures. Dr. Gomes testified cigarette smoking is a co-contributing factor that is multiplicative in nature. (CX-17A, pp. 8-9). Because the effects of asbestosis are cumulative in nature, every extra exposure is potentially more damaging. Dr. Gomes testified the scarring from asbestos may take 20 years to manifest, and only progresses over time. (CX-17A, p. 9).

8) Claimant's Social Security and Wage Records

Claimant's Social Security printout indicates he worked for Rogers Terminal and Shipping Corp. from 1958-1984; Ryan-Walsh Inc. from 1960-1989; BRM from 1960-1990; Ramsay Scarlett from 1964-1965 and 1972-1980; Baltimore Stevedoring from 1965-1971; Louisiana Stevedores Inc. from 1967-1981; and Capitol City Stevedores from 1973-1985; Cooper-T Smith Stevedoring Co. in 1983; Ceres Gulf Inc. from 1984-1986 and Cargill Marine and Terminal Inc. in 1985, 1986 and 1989. (CX-11, pp. 1-14; Signal EXH-21, 22). By comparing the pay earned at the various employers, the SS records indicate that as far back as 1968, Claimant worked predominantly for BRM, earning most of his wages through that company. *Id.*

9) Employers'/Carriers' Exhibits

Ms. LeFebvre signed an affidavit on January 31, 2001, verifying BRM's Longshore insurance carriers from 1957 through 2000. (Signal 12). A list of insurance companies, policy number and dates of coverage was attached to the affidavit and includes:

Sept. 9, 1957 – Sept. 9, 1960	Hartford Accident and Indemnity Company
Oct. 31, 1960 – Oct. 31, 1966	The Fidelity and Casualty Co. of New York
Oct. 31, 1966 – April 1, 1970	National Ben Franklin Insurance Co.

April 1, 1970 – Oct. 1, 1972	Employers Casualty Co.
Oct. 1, 1972 – Nov. 1, 1982	Employers National Insurance Co.
Nov. 1, 1982 – Oct. 1, 1985	North River Insurance Co.
Oct. 1, 1985 – Oct. 1, 1986	National Union Fire Insurance Co.
Oct. 1, 1986 – June 1, 1989	The Hartford
June 1, 1989 – Oct. 27, 1998	Signal Mutual Insurance Assoc. Ltd.
Oct. 28, 1998 – June 1, 2000	American Mutual Longshore Assoc.

(Signal EXH. 13, 12, pp. 2-3; LIGA EXH. 2, 3, 17, 20, 25, 27, 28; Fidelity EXH-6). Pursuant to LIGA EXH-7, BRM also received Longshore coverage from Gray Insurance (International Surplus Lines Ins. Co.) from November 1, 1982 through October 1, 1985. Employers Casualty Co. was rendered insolvent and placed in permanent receivership by a Texas state court on February 11, 1994. (LIGA EXH-29).

Cargo records from the Port of Greater Baton Rouge, reflecting the cargo entering and leaving the port between 1964 and 1974 were introduced by LIGA and Signal. The records indicate that between December 26, 1961 and November 11, 1966 a total of 60 ships carrying asbestos cargo docked at the Port. Of these 60 ships, BRM handled 28. (See LIGA EXH-11, 12; Signal EXH-9). BRM handled the last ship to bring asbestos cargo into the Port, on November 11, 1966. BRM also handled 3 ships carrying asbestos cargo in 1971, 4 ships in 1972 and one ship in 1973. Louisiana Stevedores handled The Kraljevica, the last ship to carry asbestos cargo in the Port, on July 28, 1974. (LIGA EXH-12, 8; Signal EXH-9).

Signal and Fidelity[10] also submitted the Daily Longshoremen Work Report for ILA Local No. 1833, for the week ending July 28, 1974, which indicates the days worked by each longshoreman through the ILA. The form shows that Claimant worked on Saturday, July 27, 1974, but not Sunday, July 28, 1974. It does not indicate which company Claimant worked for on those particular days. (Signal EXH-7, Fidelity EXH-3). Claimant last worked for BRM during the third quarter of 1990. (Signal EXH-23).

[10] LIGA submitted the daily work reports for ILA Local No. 1830, but it did not include Claimant's name. (LIGA EXH-9).

IV. DISCUSSION

A. Contention of the Parties

Claimant contends his last exposure to asbestos occurred on his last day of work in 1990; thus, BRM and carrier Signal Mutual are the last covered employer and carrier liable for his compensation benefits. Specifically, Claimant asserts the multiple shipments of asbestos cargo contaminated the warehouse and his work site, resulting in a continuing general exposure to asbestos. Claimant argues BRM should not be able to benefit from its failure to have the work site tested for asbestos, thus its argument that there are no tests to support a claim for continuing contamination should fail. He contends it is widely accepted that one does not need to have direct contact to asbestos fibers to suffer an injury. Finally, Claimant argues the medical records and deposition of Dr. Gomes and Claimant's other physicians should outweigh the opinions of Dr. Jones, who did not meet with or examine Claimant. As such, Claimant contends he is entitled to continuing medical monitoring and disability benefits as become necessary as a result of his asbestosis.

BRM/Signal Mutual contend Claimant has failed to establish he is entitled to compensation benefits. They argue Claimant has the burden of production and persuasion when proving causation. It is asserted that the medical evidence, including records from Dr. Jones and Dr. Gomes, shows that he does not suffer from asbestosis. Additionally, there is no evidence showing he was actually exposed to asbestos while at work; BRM/Signal contends the testimony of Mr. Parker is speculative at best. In the alternative, BRM/Signal contend they have rebutted Claimant's prima facie case by establishing he was last exposed to asbestos by Louisiana Stevedore on July 27, 1974, which should be found to be the last covered employer. Finally, if causation is established, BRM/Signal contend Claimant's last exposure was June 22, 1973 and that he suffers no more than a 10% impairment, per Dr. Gomes' testimony.

BRM/Continental/Ben Franklin contend that the available evidence confirms Claimant was last exposed to asbestos on July 27, 1974. Specifically, it argues Dr. Parker's testimony with respect to continuing exposure should not be given weight, as no tests of the warehouse were ever performed and Dr. Parker never personally

visited the site. As such, BRM/Continental/Ben Franklin contend Louisiana Stevedores is the last covered employer responsible for this claim; as they are out of business the Special Fund should be held liable pursuant to Section 18(b) of the Act.

LIGA adopts the positions and arguments advocated by BRM/Signal Mutual; LIGA is a party by virtue of the fact that BRM's insurance carriers for the period from April 1970 until October 1982 are now insolvent. However, LIGA contends it cannot be held liable for this claim because it is a fund of last resort. Specifically, with respect to claims involving injury from exposure to asbestos, the claimant must exhaust all solvent insurance carriers responsible for the claim, even if the last exposure to asbestos occurred during the insolvent carrier's period of coverage. In the alternative, LIGA asserts the Act provides that the vessel owner, as a contractor of the stevedoring company, is the guarantor of all compensation benefits. If Louisiana Stevedoring Company is found to be the last covered employer, LIGA argues there is no proof that the now-insolvent Employers and Employer's National Insurance Companies provided coverage to Louisiana Stevedores; as such, LIGA cannot be found liable in place of these insurance carriers. Finally, LIGA argues the current claim against it is untimely as it was not filed until May 22, 2002, after the claims bar date of July 31, 1995, and more than five years after the order of liquidation for Employers was issued on February 11, 1994.

The Director filed a post-hearing brief in this matter, contending that Claimant was last exposed to asbestos on his last day of work at the port. As such, BRM and Signal Mutual should be the employer and carrier responsible for this claim. Specifically, the Director urges the undersigned to credit the expert testimonies of Dr. Parker and Dr. Liuzza in finding that the port and warehouse were contaminated with asbestos fibers which resulted in a continuing exposure to the toxin. Moreover, the Director asserts that in light of these testimonies, BRM/Signal Mutual has failed to meet its burden in establishing it was not the last covered employer/carrier. In particular, BRM introduced no evidence that it attempted to remove asbestos from the work site. Thus, the Director asserts BRM and Signal Mutual are responsible for this claim. In the alternative, if the Special Fund is found liable pursuant to Section 18(b) of the Act, the Director stressed payment of any benefits would be within his discretion.

B. Causation

In establishing a causal connection between the injury and claimant's work, the Act should be liberally applied in favor of the injured worker in accordance with its remedial purpose. *Staffex Staffing v. Director, OWCP*, 237 F.3d 404, 406 (5th Cir. 2000), *on reh'g*, 237 F.3d 409 (5th Cir. 2000); *Morehead Marine Services, Inc. v. Washnock*, 135 F.3d 366, 371 (6th Cir. 1998)(*quoting Brown v. ITT/Continental Baking Co.*, 921 F.2d 289, 295 (D.C. Cir. 1990)); *Wright v. Connolly-Pacific Co.*, 25 BRBS 161, 168 (1991). Ordinarily the claimant bears the burden of proof as a proponent of a rule or order. 5 U.S.C. § 556(d). By express statute, however, the Act presumes a claim comes within the provisions of the Act in the absence of substantial evidence to the contrary.[11] 33 U.S.C. § 920(a). Should the employer carry its burden of production and present substantial evidence to the contrary, the claimant maintains the ultimate burden of persuasion by a preponderance of the evidence under the Administrative Procedures Act. 5 U.S.C. § 556(d); *Director, OWCP, v. Greenwich Collieries*, 512 U.S. 267, 281 (1994); *American Grain Trimmers, Inc., v. Director, OWCP*, 181 F.3d 810, 816-17 (7th Cir. 1999).

Additionally, it is well-settled that in arriving at a decision in this matter the finder of fact is entitled to determine the credibility of the witnesses, to weigh the evidence and draw his own inferences from it, and is not bound to accept the opinion or theory of any particular medical examiner. *Banks v. Chicago Grain Trimmers Association, Inc.*, 390 U.S. 459, 467 (1968); *Louisiana Insurance Guaranty Ass'n v. Bunol*, 211 F.3d 294, 297 (5th Cir. 2000); *Hall v. Consolidated Employment Systems, Inc.*, 139 F.3d 1025, 1032 (5th Cir. 1998); *Atlantic Marine, Inc. v. Bruce*, 551 F.2d 898, 900 (5th Cir. 1981); *Arnold v. Nabors Offshore Drilling, Inc.*, 35 BRBS 9, 14 (2001). Any credibility determination must be rational, in accordance with the law and supported by substantial evidence based on the record as a whole. *Banks*, 390 U.S. at 467; *Mijangos v. Avondale Shipyards, Inc.*, 948 F.2d 941, 945 (5th Cir. 1991); *Gilchrist v. Newport News Shipping and Dry Dock Co.*, 135 F.3d 915, 918 (4th Cir. 1998); *Huff v. Mike Fink Restaurant, Benson's Inc.*, 33 BRBS 179, 183 (1999).

[11] This is not to say that the claimant does not have the burden of persuasion. To be entitled to the Section 20(a) presumption, the claimant still must show a *prima facie* case of causation. *Port Cooper/T. Smith Stevedoring Co., Inc., v. Hunter*, 227 F.3d 285, 287 (5th Cir. 2000); *Director, OWCP, v. Greenwich Collieries*, 512 U.S. 267, 281 (1994).

(1) The Section 20(a) Presumption - Establishing a *Prima Facie* Case

Section 2(2) of the Act defines "injury" as "accidental injury or death arising out of or in the course of employment." 33 U.S.C. § 902(2). Section 20(a) of the Act provides a presumption that aids the claimant in establishing that a harm constitutes a compensable injury under the Act:

> In any proceeding for the enforcement of a claim for compensation under this chapter it shall be presumed, in the absence of substantial evidence to the contrary…
>
> (a) That the claim comes within the provisions of this chapter.

33 U.S.C. § 920(a).

To establish a *prima facie* claim for compensation, a claimant need not affirmatively establish a connection between work and harm. Rather, a claimant has the burden of establishing only that: (1) the claimant sustained a physical harm or pain; and (2) an accident occurred in the course of employment, or conditions existed at work, which could have caused, aggravated, or accelerated the harm or pain. *Port Cooper/T. Smith Stevedoring Co., Inc., v. Hunter*, 227 F.3d 285, 287 (5th Cir. 2000); *O'Kelly v. Department of the Army*, 34 BRBS 39, 40 (2000); *Kier v. Bethlehem Steel Corp.*, 16 BRBS 128, 129 (1984). Once this *prima facie* case is established, a presumption is created under Section 20(a) that the employee's injury or death arose out of employment. *Hunter*, 227 F.3d at 287. However, "the mere existence of a physical impairment is plainly insufficient to shift the burden of proof to the employer." *U.S. Industries/Federal Sheet Metal Inc., v. Director, OWCP*, 455 U.S. 608 (1982). *See also Bludworth Shipyard Inc., v. Lira*, 700 F.2d 1046, 1049 (5th Cir. 1983)(stating a claimant must allege an injury arising out of and in the course and scope of employment); *Devine v. Atlantic Container Lines*, 25 BRBS 15, 19 (1990)(finding the mere existence of an injury is insufficient to shift the burden of proof to the employer).

(1)(a) Existence of Physical Harm or Pain

To show harm or injury a claimant must show that something has gone wrong with the human frame. *Crawford v. Director, OWCP*, 932 F.2d 152, 154 (2nd Cir. 1991); *Wheatley v. Adler*, 407 F.2d 307, 311-12 (D.C.Cir. 1968); *Southern Stevedoring Corp., v. Henderson*, 175 F.2d. 863, 866 (5th Cir. 1949). An injury cannot be found absent some work-related accident, exposure, event or episode. *Adkins v. Safeway Stores, Inc.*, 6 BRBS 513, 517 (1978). Under the aggravation rule, an entire disability is compensable if a work related injury aggravates, accelerates, or combines with a prior condition. *Gooden v. Director, OWCP*, 135 F.3d 1066, 1069 (5th Cir. 1998)(pre-existing heart disease); *Kubin v. Pro-Football, Inc.*, 29 BRBS 117, 119 (1995)(pre-existing back injuries).

In the present case, between 1989 and 1994, Claimant was diagnosed with thickening and scarring of the pleura, the lining around the lungs. Dr. Hodges noted this was asymptomatic and not evidence of asbestosis. However, on August 31, 1994, Claimant was diagnosed with asbestos-related scarring of the lungs and pleura. In 1997, he was found to have multiple focal pleural plaques bilaterally with no adenopathy, pulmonatry infiltrate or effusion. X-rays taken in September 1999 revealed bilateral pleural plaques and October 2000 x-rays showed bilateral chronic pulmonary parenchymal pleural changes. Dr. Gomes testified that pulmonary function studies performed in 2003 placed Claimant in the low/normal range of lung capacity sufficient for a Class 2 (10-25%) impairment rating under the AMA Guidelines. X-rays also showed bilateral pleural plaque formation, interstitial fibrosis and pleural thickening. Dr. Gomes testified Claimant had a pretty clear case of asbestosis.

Employer's expert, Dr. Jones, reviewed Claimant's medical records and reported that he suffered from asbestos-related pleural plaques which were asymptomatic and posed no threat to his lung function. Additionally, Employer strongly argues that Dr. Gomes' testimony that Claimant's lung function was in the low/normal range is inconsistent with his diagnosis of asbestosis. I find Dr. Gomes's opinions to be more reliable and credible than those of Dr. Jones. While Dr. Gomes only evaluated Claimant on one occasion, he actually met with Claimant and took an occupational history, performed a physical examination and conducted pulmonary function studies and x-rays. Dr. Jones merely reviewed Claimant's file and did not meet with him in person. Additionally, Dr. Jones did not address the findings of interstitial fibrosis and scarring of the lungs in opining

Claimant's condition consisted of asymptomatic pleural plaques. Moreover, Employer's objection that Dr. Gomes' testimony was internally inconsistent is without merit as Dr. Gomes' findings of low/normal lung function are not inconsistent with a diagnosis of mild lung impairment. By making its argument, Employer places itself in the shoes of a physician, which it is not.

In light of the foregoing, I find that the evidence supports the conclusion that Claimant indeed suffers from asbestos-related diseases of his lungs, as noted throughout his medical records and testified to by Dr. Gomes. Thus, he has satisfied the first prong of the Section 20(a) presumption.

(1)(b) Establishing that an Accident Occurred in the Course of Employment, or that Conditions Existed at Work, Which Could Have Caused the Harm or Pain

Although a claimant is not required to introduce affirmative medical evidence establishing that working conditions caused the harm, a claimant must show the existence of working conditions that could conceivably cause the harm alleged beyond a "mere fancy or wisp of 'what might have been.'" *Wheatley*, 407 F.2d at 313. A claimant's uncontradicted credible testimony alone may constitute sufficient proof of physical injury. *Hampton v. Bethlehem Steel Corp.*, 24 BRBS 141, 144 (1990)(finding a causal link despite the lack of medical evidence based on the claimant's reports); *Golden v. Eller & Co.*, 8 BRBS 846, 849 (1978), *aff'd*, 620 F.2d 71 (5th Cir. 1980)(same). On the other hand, uncorroborated testimony by a discredited witness is insufficient to establish the second element of a *prima facie* case that the injury occurred in the course and scope of employment, or conditions existed at work which could have caused the harm. *Bonin v. Thames Valley Steel Corp.*, 173 F.3d 843 (2nd Cir. 1999)(unpub.)(upholding ALJ ruling that the claimant did not produce credible evidence a condition existed at work which could have cause his depression); *Alley v. Julius Garfinckel & Co.*, 3 BRBS 212, 214-15 (1976)(finding the claimant's uncorroborated testimony on causation not worthy of belief); *Smith v. Cooper Stevedoring Co.*, 17 BRBS 721, 727 (1985)(ALJ)(finding the claimant failed to meet the second prong of establishing a *prima facie* case because the claimant's uncorroborated testimony linking the harm to his work was not supported by the record).

In the present case, Claimant testified he worked with asbestos cargo while working for Baton Rouge Marine, among other stevedoring companies. The credible testimony of the Claimant as well as the other longshoremen fact witnesses and BRM firmly establishes that they were exposed to asbestos dust

particles when they were required to unload and load the ships and trucks that carried asbestos. Specifically, BRM representatives testified that BRM held an exclusive contract with the Port Commission to provide all truck loading and unloading services at the port; thus, even if BRM did not have a ship exporting asbestos, the evidence indicates it would have unloaded the trucks or loaded the trucks with the asbestos set for import/export. Pursuant to the credible testimony of Ms. LeFebvre, BRM did not work on Sunday, July 28, 1974 when Louisiana Stevedores exported the last shipment of asbestos out of Baton Rouge. However, she also testified BRM did work on Saturday, July 27, 1974; in keeping with BRM's exclusive truck contract with the Port, she testified it was likely that BRM unloaded asbestos from the trucks on the 27th, and placed the cargo in the warehouse for Louisiana Stevedores to load onto the ship on the 28th. The Daily Longshoreman's Work Report for the week ending July 28, 1974, indicates Claimant worked on July 27, but not on July 28. Although the report does not show which stevedoring company Claimant worked for on the 27th, his testimony that he mostly worked for BRM and the fact that BRM would have been responsible for unloading the trucks before Louisiana Stevedores could load the ship is sufficient for Claimant to fulfill the second prong of the 20(a) presumption that conditions existed at his work on July 27, 1974, which could have caused his current condition.

Additionally, Claimant presented the testimony of industrial hygienist and environmental engineer Frank Parker who testified the extensive and casual handling of asbestos cargo in the Port of Baton Rouge in the 1960s and 1970s not only caused acute exposure to the longshoremen, but resulted in a contamination of the warehouse which, without proper eradication procedures, most likely resulted in continuing exposures to those working in the warehouse. Specifically, Dr. Parker testified asbestos fibers do not biodegrade and can lodge themselves in the structure of the warehouse. Though this generalized exposure was not as significant as the direct handling of asbestos cargo, Dr. Parker testified it would have nonetheless been an asbestos exposure which would have contributed to Claimant's current lung condition. Dr. Parker, along with Dr. Liuzza, testified there is no insignificant exposure level of asbestos; every exposure no matter how small has a multiplicative effect on a person's risk of developing asbestos-related diseases. As BRM testified the warehouse had never been cleaned for asbestos removal, Dr. Parker opined Claimant's last injurious exposure to asbestos fibers occurred on his last day of work at the Port of Baton Rouge.

Employer contends Dr. Parker's testimony that asbestos fibers remained in the warehouse until Claimant's retirement in 1990 should not be credited, because

he never visited the Port of Baton Rouge or tested the levels of asbestos dust in the air of the warehouse. However, Dr. Parker had been accepted by the parties as an expert witness in the field of industrial hygiene and environmental engineering; he was also a noted expert in the area of asbestos contamination. As such, he is entitled to give his opinions on an issue relying upon credible record evidence, as explained above. Here, Dr. Parker testified within the area of his expertise that the contamination of the warehouse at the Port of Baton Rouge likely continued until 1990; I find no reason to discredit this testimony and find that it is sufficient to establish the second prong of the 20(a) presumption that conditions at Claimant's work existed in 1990 which could have contributed to his current condition.

In light of the foregoing, I find Claimant has invoked the Section 20(a) presumption. He has been diagnosed with asbestosis which could have been caused by exposure in 1974 and throughout his work with BRM at the Port of Baton Rouge until his retirement in 1990. Claimant has satisfied both prongs of the section 20(a) presumption sufficient to invoke the presumption and establish a *prima facie* case.

(2) Rebuttal of the Presumption / Responsible Employer/Carrier

"Once the presumption in Section 20(a) is invoked, the burden shifts to the employer to rebut it through facts - not mere speculation - that the harm was not work-related." *Conoco, Inc., v. Director, OWCP*, 194 F.3d 684, 687-88 (5th Cir. 1999). To rebut the presumption of causation, the employer is required to present *substantial evidence* "to prove either: (1) that exposure to injurious stimuli did not cause the employee's occupational disease, or (2) that the employee was performing work covered under the LHWCA for a subsequent employer when he was exposed to injurious stimuli." *New Orleans Stevedores v. Ibos*, 317 F.3d 480, 483 (5th Cir. 2003)(*citing Avondale Indus., Inc., v. Dir., OWCP [Cuevas]*, 997 F.2d 186, 190 (5th Cir. 1992); *Noble Drilling v. Drake*, 795 F.2d 478, 481 (5th Cir. 1986). The Fifth Circuit described *substantial evidence* as a minimal requirement; it is "more than a modicum but less than a preponderance." *Ortco Contractors, Inc., v. Charpentier*, 332 F.3d 283, 290 (5th Cir. May 21, 2003).

(2)(a) Causation

In the present case, Claimant has established a *prima facie* case that he suffers from asbestosis which was caused by work-place exposure to asbestos fibers beginning in the 1960s and continuing until his retirement from the union in 1990. Employer/Carriers first contend Claimant suffers no asbestosis disease, as

Dr. Jones testified pleural plaques pose no threat to lung function. As stated above, I do not find the testimony of Dr. Jones, who did not evaluate Claimant on any occasion, to be entirely credible. Furthermore, because he failed to consider other findings by Claimant's various physicians, including asbestos-related scarring of the lungs and interstitial fibrosis, I find his testimony to be incredible and not sufficient to rebut the findings and opinions of Dr. Gomes.

As to the causation of Claimant's asbestosis, Employer/Carriers contend Claimant was last exposed to asbestos on July 27, 1974, through his employment with Louisiana Stevedores, the arguably "responsible employer." I note that Louisiana Stevedores was responsible for loading the last ship to export asbestos from the Port of Baton Rouge, which sailed on July 28, 1974. The Daily Longshoreman Work Report for that week indicates Claimant did not work on the 28th. Although there is no factual evidence to shed light on which company Claimant worked for on the 27th (be it BRM or Louisiana Stevedores) the testimony of Claimant and Ms. LeFebvre, detailed *supra*, is sufficient to support a prima facie case that he worked for BRM on the 27th and I find Employer failed to submit substantial evidence to rebut this.

Notwithstanding the finding that Claimant was last exposed to asbestos cargo on July 27, 1974 when working for Employer BRM, Employer/Carriers failed to rebut Dr. Parker's testimony that asbestos exposure continued at the warehouse indefinitely secondary to the contamination of the worksite in the 1960s and 1970s and the lack of asbestos eradication. Employer/Carriers contend Dr. Parker's testimony should be discredited, but as stated above I found him to be a credible witness in the areas of industrial hygiene and environmental engineering, particularly as they relate to asbestos contamination. As Claimant established a *prima facie* case, the burden of production now shifts to Employer to rebut it by facts, not mere speculation, to sever the causal link.

Employer has produced no evidence to rebut Dr. Parker's testimony. They produced no air quality studies to show the absence of asbestos in the warehouse in 1990. Likewise, they produced no expert witness to contradict the opinion that exposure continued until 1990. Employer/Carriers merely argued the testimony in record was not credible. As Claimant contends, Employer attempts to rely on its failure to monitor the air quality at the warehouse as proof that there was no asbestos present. I do not find this constitutes substantial evidence, nor evidence at all, sufficient to rebut Claimant's *prima facie* case. Therefore, I find Claimant's current condition of asbestosis and impaired lung function to be causally related to

his exposure to asbestosis at the Port of Baton Rouge which continued throughout his work with BRM.

(2)(b) Responsible Employer/Carrier

An employer may also rebut a claimant's *prima facie* case by proving that the claimant's injury is the result of subsequent maritime employment. 33 U.S.C. § 904(a). In a situation where two "employers may be responsible for a work-related injury or disease, the last employer is completely liable." *Todd Shipyards Corp., v. Black*, 717 F.2d 1280, 1284 (9th Cir. 1983). The "last covered employer" rule is necessary because of the difficulties that would result under the Act in apportioning liability among several responsible employers. *Travelers Insurance Corp., v. Cardillo*, 225 F.2d 137, 145 (2d Cir. 1955).

Notably, the last exposure rule does not require a showing of an actual medical causal relationship between claimant's exposure and his occupational disease, including asbestosis; rather, the last covered employer who exposes a claimant to injurious stimuli thereby contributing to an occupational injury is completely liable for the entire disability. *Ibos*, 317 F.3d at 483 (*citing Cardillo*, 225 F.2d 137)(emphasis added); *Liberty Mut. Ins. Co. v. Commercial Union Ins. Co.*, 978 F.2d 750 (1st. Cir. 1992). The last covered employer becomes liable for an occupational disease at the time of injury once the disease manifests itself. The time of the injury is when the disease "manifests" itself and not when the events causing the occupational disease occurred. *Black*, 717 F.2d at 1285; s*ee also Newport News Shipbuilding & Dry Dock, Co., v. Stilley*, 243 F.3d 179 (4th Cir. 2001). The application of the "manifestation" theory to determine when an "injury" occurs is consistent with the Act in that:

> First, the manifestation rule best comports with the LHWCA's "paramount goal" of compensating workers for lost earning capacity stemming from occupational diseases. Second, the date of manifestation most realistically defines when injury occurs because a person would not consider himself injured at the time of exposure. Finally, the trend in statutes and court decisions in instances of diseases with long latency periods favors application of the manifestation rule.

Insurance Co. of North America v. U.S. Dept. of Labor, 969 F.2d 1400, 1404 (2nd Cir. 1992)(citing *SAIF Corp./Oregon Ship v. Johnson*, 908 F.2d 1434, 1439 (9th Cir. 1990)(quoting *Todd Shipyards Corp. v. Black*, 717 F.2d 1280, 1289 (9th Cir.

1983)). *See also Castorina v. Lykes Bros. S.S. Co.*, 758 F.2d 1025, 1031 (5th Cir. 1985)(using the date of manifestation to determine the applicable law in an asbestosis case).

In occupational disease cases where exposure to injurious conditions occurred in the service of a last responsible employer who was covered by multiple insurers, the last carrier during the exposure period is the responsible carrier. *Liberty Mutual*, 978 F.2d at 752. The burden is on the carrier to show the inapplicability of the policy or that it was not the last insurer. *Dolowich v. West Side Iron Works*, 17 BRBS 197 (1985).

In the present case, it has been determined that Claimant was last exposed to asbestos on his last day of work for Employer BRM in July 1990. Although Dr. Parker testified the last exposure on this date would not have been significant, it nonetheless would have contributed to Claimant's asbestos-related lung disease. This has not been rebutted by Employer/Carriers. Claimant retired from the union in 1990 and did not work for a subsequent maritime employer after BRM. In light of the foregoing, BRM is the last responsible employer liable for this claim. Likewise, Signal Mutual, the insurance company which covered BRM from 1989 to 1998 clearly provided the only coverage during the last exposure. Thus, Signal Mutual is the last covered carrier responsible for the present claim. BRM and Signal Mutual shall be liable for this claim as of the date of injury, or January 18, 1994, the date on which Claimant was first diagnosed with asbestos pleural thickening.

C. Compensation Benefits

If a claimant voluntarily retires from his employment and then is impaired by an occupational disease, his recovery of disability compensation is limited to an award for permanent partial disability in accordance with § 8(c)(23) of the Act and based on the extent of his impairment as measured by the AMA GUIDES TO THE EVALUATION OF PERMANENT IMPAIRMENT. *See Morin v. Bath Iron Works Corp.*, 28 BRBS 205 (1994). Where a voluntary retiree suffers an occupational disease which causes disability more than one year after retirement, the applicable average weekly wage used to calculate the weekly benefit payable is the national average weekly wage in effect at the time of injury, which is the time of awareness of the occupational disability. 33 U.S.C. § 910(d)(2); *Shaw v. Bath Iron Works Corp.*, 22 BRBS 73 (1989); *Coughlin v. Bethlehem Steel Corp.*, 20 BRBS 193 (1988).

Here, Claimant retired in 1990 after 30 years of working as a longshoreman at the Port of Baton Rouge. He testified he took his 30-year pension afforded all longshoreman; there is no indication in the record that his retirement was anything but voluntary. Indeed, there is no suggestion Claimant's retirement was related to his asbestosis; he was first diagnosed with pleural plaques in 1994, four years after his retirement, but was not diagnosed with an impairment of his lung function until 2003 when he treated with Dr. Gomes. As such, he is entitled to permanent partial disability.

Dr. Gomes testified Claimant's exposure to asbestos resulted in a class 2 impairment of 10-25% under the AMA Guidelines; he added that the impairment rating of 10-25% was based on forced vital capacity between 60 and 79 percent of predicted levels. In actuality, Dr. Gomes measured Claimant's forced vital capacity at 79% of predicted. Accordingly, I find Claimant is entitled to compensation benefits based on a 10% disability. The national average weekly wage at the time of Claimant's injury was $369.15; Claimant is therefore entitled to 10% of that amount, or $36.92 per week, as of January 18, 1994.

D. Medical Benefits

Section 7(a) of the Act provides that "the employer shall furnish such medical, surgical, and other attendance or treatment . . . for such period as the nature of the injury or the process of recovery may require." 33 U.S.C. § 907(a). The Board has interpreted this provision to require an employer to pay all reasonable and necessary medical expenses arising from a workplace injury. *Dupre v. Cape Romaine Contractors, Inc.*, 23 BRBS 86 (1989).

Although Claimant currently suffers only minor asbestos-related impairment of his lung function, the medical evidence in record clearly establishes that he is at a much heightened risk for developing more serious impairments, including mesothelioma and lung cancer. As such, I find Dr. Gomes' recommendation for annual chest x-rays, pulmonary function studies and immunizations for the remainder of Claimant's life constitute reasonable and necessary treatment to monitor the progression of Claimant's disease and provide treatment as necessary.

E. Conclusion

To conclude, I find Claimant suffers asbestosis and impairment of his lung function as a result of his exposure to asbestos and asbestos cargo while working as a longshoreman at the Port of Baton Rouge. Specifically, while Claimant was last exposed to asbestos cargo on July 27, 1974, due to the lack of asbestos abatement from the warehouse and work site, said exposure continued through his entire tenure at the Port. As such, his last injurious exposure occurred on his last day of work at the Port. Claimant last worked for BRM, retiring in July, 1990, rendering BRM the last responsible employer and Signal Mutual the last responsible carrier for this claim. Claimant is entitled to receive continuing medical monitoring to include annual chest x-rays, pulmonary function studies and immunizations as recommended by Dr. Gomes. Additionally, Claimant is entitled to weekly compensation benefits in the amount of $36.92 as of January 18, 1994, the date he first became aware of his occupational disease and, thus, his date of injury.

F. Interest

Although not specifically authorized in the Act, it has been an accepted practice that interest at the rate of six per cent per annum is assessed on all past due compensation payments. *Avallone v. Todd Shipyards Corp.*, 10 BRBS 724 (1974). The Benefits Review Board and the Federal Courts have previously upheld interest awards on past due benefits to insure that the employee receives the full amount of compensation due. *Watkins v. Newport News Shipbuilding & Dry Dock Co.*, *aff'd in pertinent part and rev'd on other grounds, sub nom*. *Newport News v. Director, OWCP*, 594 F.2d 986 (4th Cir. 1979). The Board concluded that inflationary trends in our economy have rendered a fixed six per cent rate no longer appropriate to further the purpose of making Claimant whole, and held that "...the fixed per cent rate should be replaced by the rate employed by the United States District Courts under 28 U.S.C. § 1961 (1982). This order incorporates by reference this statute and provides for its specific administrative application by the District Director. *See Grant v. Portland Stevedoring Company, et al.*, 17 BRBS 20 (1985).

Effective February 27, 2001, this interest rate is based on a weekly average one-year constant maturity Treasury yield for the calendar week preceding the date of service of this Decision and Order by the District Director. This Order incorporates by reference this statute and provides for its specific administrative application by the District Director.

G. Attorney Fees

No award of attorney's fees for services to the Claimant is made herein since no application for fees has been made by the Claimant's counsel. Counsel is hereby allowed thirty (30) days from the date of service of this decision to submit an application for attorney's fees. A service sheet showing that service has been made on all parties, including the Claimant, must accompany the petition. Parties have twenty (20) days following the receipt of such application within which to file any objections thereto. The Act prohibits the charging of a fee in the absence of an approved application.

V. ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law and upon the entire record, I enter the following Order:

1. Employer BRM/Signal Mutual shall pay to Claimant permanent partial disability benefits pursuant to Section 908(c)(23) of the Act for the period from January 18, 1994, to present and continuing, based on the National Average Weekly Wage of $369.15 and a 10% disability rating, and a corresponding compensation rate of $36.92.

2. Employer BRM/Signal Mutual shall pay Claimant for all future reasonable medical care and treatment arising out of his work-related injuries pursuant to Section 7(a) of the Act, to include annual chest x-rays, pulmonary function studies and immunizations.

3. Employer BRM/Signal Mutual shall pay Claimant interest on accrued unpaid compensation benefits, in accordance with this decision.

4. Claimant's counsel shall have thirty (30) days to file a fully supported fee application with the Office of Administrative Law Judges, serving a copy thereof on Claimant and opposing counsel who shall have twenty (20) days to file any objection thereto.

A

CLEMENT J. KENNINGTON
Administrative Law Judge